SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
MAY 29 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1493

ALICE LOVE, et al.,

Petitioners,

vs.

DADE COUNTY SCHOOL BOARD, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled cause on February 28, 1975.

OPINIONS BELOW

The opinions of the Courts below directly preceeding this petition are as follows:

1. The District Court order of July 30, 1974 is unreported and is printed in the Appendix hereto.

2. The District Court order of August 6, 1974 is unreported and is printed in the Appendix hereto.

3. The Court of Appeals order of February 28, 1975 is unreported and is printed in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on February 28, 1975. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

I.

WHETHER THE COURT BELOW ERRED IN UPHOLDING THE ESTABLISHMENT OF A RESEGREGATIVE SIX-SCHOOL-KINDERGARTEN-THROUGH-TWELFTH - G R A D E ALL-BLACK FEEDER PLAN.

II.

WHETHER THE COURT BELOW ERRED IN PREMATURELY UPHOLDING REJECTION OF CONSIDERATION OF A COMPREHENSIVE DESEGREGATION PLAN FOR THE 1975-1976 SCHOOL YEAR IN VIEW OF THIS FEEDER PLAN AND THE DISTRICT COURT'S ORDER GRANTING AN EVIDENTIARY HEARING ON THE CONSTRUCTION PLAN.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

1. INTRODUCTION

This Dade County, Florida public school desegregation case was initiated in 1969 and has been pending in the courts ever since.[1] The Plaintiff, Pate, is no longer involved, Defendant remains the Dade County School Board, and Intervenors, Alice Love, et al. (Appellants below) are the Petitioners to this Court.

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[1]Pate v. Dade County School Board, 434 F.2d 1151 (5th Cir. 1970), cert. den. 402 U.S. 953 (1971); 447 F.2d 150 (5th Cir. 1971), cert. den. 405 U.S. 1064 (1972); see Appendix hereto for unreported orders and opinions below (1974). Earlier proceedings include reported opinions at 303 F.Supp. 1068 (S.D.Fla. 1969), 307 F.Supp. 1288 (S.D.Fla. 1969), 315 F.Supp. 1161 (S.D.Fla. 1970). Some opinions appear sub nom Love v. Dade County School Board.

The two most significant decisions *before* the 1974 immediate proceedings below may be summarized briefly.

On August 12, 1970, the Court of Appeals' controlling opinion in the case at bar ordered various specific modifications of the District-Court-approved-School Board plan (as first modified by the District Court) in order to "effectively desegregate the Dade County School System" (434 F.2d 1151), and this Court denied the School Board's Petition for Certiorari (402 U.S. 953).

On June 14, 1971, the District Court entered an Order finding the Dade County's dual school system disestablished in accordance with such opinion, and retaining jurisdiction to assure its continual maintenance in a unitary manner. (R. 1-4)[2]

During the rest of 1971, 1972 and 1973, Intervenors were unsuccessful in their Court-objections to the School Board's Feeder Plans (Pupil Assignment plans) but Intervenors did help prevent regression. Thus the School Board did abandon a particularly discriminatory and resegregative proposed Feeder Plan in response to Intervenors' Motion for Hearings on said Plan as well as a previously-rejected 15-40%-black total desegregation plan (the Motion was denied as moot by the District Court on March 22, 1973, R. 76).

The School Board, however, has succeeded in going backwards in 1974 despite Intervenors' efforts to date.

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[2]"R" refers to the Record on Appeal in the Court of Appeals below. Pertinent citations are included herein for possible use by the parties or this Court if and when the Record below is certified.

2. THE PROCEEDINGS BELOW

Turning now to the immediate proceedings giving rise to this Petition, in the spring of 1974 the School Board adopted a Feeder Plan and Construction Plan for the 1974-1975 school year. Intervenors deemed the Plan resegregative, discriminatory and unconstitutional: the Feeder Plan (similar to the one abandoned in 1973) establishes a six-school-K-12-all-black inner-city feeder system (many of said schools' students having attended desegregated schools the prior year) *inter alia;* the Construction Plan, for example, includes several new schools to be built in almost-all-white areas while excluding needed construction in primarily-black-and-Cuban-areas as well as construction in areas where desegregated schools would be feasible and practical.

In accordance with the District Court's express retention of jurisdiction "to assure that the school system does not revert to a state-imposed dual school system", on June 20, 1974, Intervenors filed in the District Court their 29 page "Petition for Supplemental Relief to Maintain Unitary School System Insofar As It Has Been Established To Date By Court Order And To Disestablish Dual School System Insofar As It Now Exists By Enjoining Further Implementation of 'Feeder Plan' And 'New Construction Plan' As Well As Requiring Adoption of Appropriate New Desegregation Plan" (R. 70-98). This Supplemental Petition challenged both the 1974 Feeder Plan and Construction Plan adopted by the School Board as (1) violative of the Orders of the Court of Appeals, as well as the District Court below and (2) intentionally segregative actions now rendering the Dade County School system a dual system. The Petition asserted the need for a com-

prehensive desegregation plan and stated Intervenors' retention of Dr. John A. Finger, Jr. to prepare such a plan for the District Court's later consideration for the 1975-1976 school year.

Relief sought in the Supplemental Petition included (1) full discovery and evidentiary hearings to develop a full record, (2) an injunction against further implementation of the Feeder Plan and the Construction Plan, and (3) subsequent adoption of a full desegregation plan.

Following the School Board's Motion to Dismiss and Response, Intervenors' Reply, etc., and a hearing limited to arguments of counsel (R. 270, 301, 317, 328, 329, 345, 361), the District Court *denied* the Supplemental Petition with respect to enjoining the 1974 Board-adopted Feeder Plan and with respect to consideration of Intervenors' proposed 1975-1976 comprehensive desegregation plan(s) on the ground that there was no "prima facie showing" of the School Board's failure to assure no reversion to a dual school system; the District Court *granted* the Supplemental Petition with respect to the Construction Plan to the extent of scheduling an evidentiary hearing thereon (said hearing is to be held sometime in the future after completion of all Court proceedings on the denied relief, R. 355, 360; Appendix *infra*).

The Court of Appeals affirmed the District Court's decision upholding the Feeder Plan and rejecting any 1975-1976 comprehensive desegregation plan (Appendix *infra*). (The Construction Plan presented no issue on appeal as the School Board did not cross-appeal the District Court's granting of an evidentiary hearing thereon at some as yet undetermined date).

The within Petition for Certiorari seeks review by this Court of said affirmance below.

3. THE "FACTS" IN SUPPORT OF THE SUPPLEMENTAL PETITION

Since to date no evidential hearing has been allowed on Intervenors' Supplemental Petition, the supporting "facts" before the Court below (and this Court should certiorari be granted), consist of said Supplemental Petition and Exhibits attached thereto (Feeder Plan, Exhibit A; Construction Plan, Exhibit B; photographic reproductions about 3 feet by 5 feet, of the School Board Offices' 3 maps locating all Elementary, Junior High and Senior High Schools, Exhibit C; Dr. John A. Finger, Jr.'s Preliminary Report, Exhibit D), Intervenors' Reply (Curriculum Vitae of Dr. Finger, Exhibit E), and Intervenors' letter-reply concerning Construction. (R. 99, 151, 262, 265).

A. 1974 FEEDER PLAN

The School Board's failure to pass a similar plan the year before, in view of the District Court's Biracial/Tri-Ethnic Committees' negative report and Intervenors' prior Court-objections thereto, is set forth in the Supplemental Petition along with the School Board's adoption of the 1974 Feeder Plan over objections of two School Board members and of the District Court's Committee that insufficient time to study the Plan was allowed. (R. 70 et. seq.) The Supplemental Petition challenges three portions of the Feeder Plan, the chief objection being on p. 9 (R. 78):

"The most objectionable feature of the Feeder Plan is the establishment of a six-all-black elementary-through-Senior-High-School feeder system under which four elementary schools, *Olinda, Orchard Villa, Drew* and *Holmes*, feed *Drew Middle School* which feeds *Miami Northwestern Senior High;* the attendance zone for the elementary schools, Junior and Senior High Schools are 'congruent' (See Feeder Plan, North Central Area, pp. 18-19). Thus, any kindergarten-age child living within this attendance zone is guaranteed an all-black public school education for the next thirteen years, i.e., is sentenced to segregated public schools for the rest of his childhood."

Intervenors' Reply (R. 329) states as follows: ". . . Defendant attempts to blunt the obvious resegregation of the proposed Feeder system by pointing to the elimination of Dorsey [Junior High] and then attaches an exhibit [Exhibit I, Motion to Dismiss . . .] showing almost half of the present feeders were *non*-Dorsey feeders. It tries to pass off the 3,610 blacks[1] who will attend K-12 in totally black schools as not a whit different from the present situation where some of them at least go to white schools part of their school lives and the remainder share with their classmates, who at some point attended desegregated schools, the experiences of non-segregated education."

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[1]School Board Report dated April 1, 1974, pp. 10-12, gives Drew, Holmes, Olinda, Orchard Villa Elementary School number of students as 824, 740, 774 and 1272 (for a total of 3610).

Intervenors' Supplemental Petition, p. 12, noted the Bi-Racial Committee's March 8, 1974 Report to the District Court specifically objecting to "locking in a six-school, all-black Northwestern feeder system"; the Committee's opinion is that Northwestern can be maintained "as a first-class high school" without "the unsound feeder patterns that now exist if some reasonable and practicable transportation is considered as a desegregation tool (a position fully supported by *Swann*)."

B. 1974 CONSTRUCTION PLAN

While Intervenors are obviously not asking this Court to review that portion of the District Court's order *granting* an evidentiary hearing on the 1974 New Construction Plan, brief note of the supporting facts presented below is indicated because such constitute part of the deliberate resegregation and Constitutional violation urged by Intervenors as a basis for the relief requested and especially for later consideration of a 1975-1976 comprehensive desegregation plan (relief denied by the courts below).

Intervenors' Supplemental Petition (R. 83) challenged *inter alia*, four new high schools to be built in the suburbs to serve mostly white students and *no* new downtown Miami High School (suggested by the State Board of Education) to serve Black and Latin students as well as relieving overcrowding at predominantly black Miami Jackson and predominantly Cuban Miami High School.

Intervenors' Reply (R. 321) refers to the Biracial/Tri-Ethnic Committee's May 24, 1974 Report to the District Court stating that three proposed new elementary and secondary school sites will be in virtually all-white

areas and recommending their construction *only if* attendance plans, etc. would render such schools "nonracially identifiable" and *only if* "any transportation involved would be two-way with all racial and ethnic groups sharing an equitable responsibility" (Intervenors' evidence not indicating the School Board's compliance with the conditions).

Intervenors' July 16, 1974 letter-reply sent to the District Court contends that the Palmetto/South Dade relief school (R. 346), the Miami Edison replacement school (R. 346), the Miami Carol City/Hialeah-Miami Lakes relief school (R. 347), and the Miami Killian/Southwest relief school (R. 347) will be virtually all-white but for the Edison replacement which "amounts to affirmative resegregative action because the Board is aiding the fastest tipping Senior High in the Dade County system to continue becoming all-black (rather than moving the attendance zone northward to add white students or taking similar steps)."

Perhaps most revealing is the Construction Plan's "seed grant" of $25,000 (with $500,000 later sought) to all-black Miami Northwestern Senior High to develop the concept of turning said school into some kind of Center for Performing and Visual Arts *in order to attract white students.* While such a Center offers valuable training and skills, as stated in the Supplementary Petition (R. 83-84), "Singing and dancing are no substitute for desegregation." Intervenors' Reply (R. 322) contains the following:

> ". . . [*Brown I* holds] to the effect that reading, 'riting and 'rithmetic are no *substitute* for de-

segregation either. Quality education includes Constitutional desegregation as well as proper curriculum."

C. DUAL SYSTEM

Intervenors' Supplemental Petition (R. 70) sets forth various factual material concerning the dual school system now existing in Dade County in view of the failure of the 1970 Court-Ordered plan and in view of School Board discriminatory action and inaction. A specific statistical comparison of the expected racial composition of numerous paired and grouped schools named in the Court of Appeals' 1970 opinion (434 F.2d 1151) and their actual racial composition as of February 12, 1974 is made (Appendix, *infra*), demonstrating that the "Court's plan has not worked realistically and indeed in view of School Board inaction and action, is now hardly working at all" (R. 84). Additional statistics are set forth demonstrating that Dade County not only ranks at or near bottom of desegregation achievement by Florida large-city school-districts (and is today far behind what many other Florida counties achieved three years ago) but also has *increased* the percentage of black students in 100% all-black schools from 12.9% in 1971 to 15.7% in 1974.[4] (R. 88, 89). The School Board's consistent placement of the burden of desegregation on the black community and disregard of the Court of Appeals' direction not to "diminish the degree of desegregation", the District Court's warnings that such was occurring, and the Biracial/Tri-Ethnic Committee's similar conclusions, is also set forth in some detail (R. 89-93).

[4]The School Board's Exhibit IV, attached to its Motion to Dismiss, shows an increase of 1,663 more black students in 100% black schools in 1973 compared to 1972.

D. COMPREHENSIVE DESEGREGATION PLAN FOR THE 1975-1976 SCHOOL YEAR

Intervenors attempted to assist both the District Court below and the School Board by retaining Dr. John A. Finger, Jr., to prepare a desegregation plan "which will eliminate existing segregation and/or resegregation without unnecessary extensive busing", and also to prepare a second plan "using such maximum guidelines for number of students, numbers of miles or numbers of minutes for busing as this (District) Court may set". (Supplemental Petition, R. 93-94; Intervenors' Reply, R. 320).

Dr. Finger (whose impressive Curriculum Vitae is attached to Intervenors' Reply as Exhibit E), after reviewing and analyzing the various relevant materials concerning the Dade County School System, concluded in his Preliminary Report that (1) the Feeder Plan and Construction Plan perpetuates segregation rather than effectuating desegregation, (2) "parts of Dade County . . . can be desegregated without long distance pairing of schools", (3) "[w]hile it *may* prove impossible to desegregate each and every school in Dade County without extensive busing the possibility of doing so should not be discarded without extensive study and analysis", and (4) he would like to prepare a feasible total desegregation plan for Dade County, the sixth largest school district in the nation, for presentation to the District Court "for consideration for the 1975-1976 school year". (R. 265-269)

Although the 1974 Feeder and Construction Plans were challenged below specifically, both involve subsequent school years in practice and as adopted.

REASONS FOR GRANTING THE WRIT

1. *The six-school-kindergarten-through-twelfth-grade Feeder Plan recreates a dual school system in Dade County* by guaranteeing a permanent all-black segregated school system for over three thousand inner-city children divided by skin color from the remaining school system. The School Board has breathed new life into "separate but equal" by allegations of "separate but quality education" or "separate but stabilized". Regardless of the slogan or obfuscation by pedagogic jabberwocky, the establishment or reestablishment of a dual school system (with identifiable separatism based on color) is in violation of *Brown v. Board of Education*, 347 U.S. 483 (1954), *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968) and *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). *Swann* specifically prohibits reversion of a "unitary" school system to a state-imposed dual school system.

Certainly twenty-one years should be sufficient maturation period for the concept that educating culturally, economically, and politically deprived inner-city children in a school system that exemplifies a philosophy that "Blacks should be separated from Whites" is constitutionally impermissible, *Brown v. Board of Education, supra.*

When the Court of Appeals initially in 1970 found no "feasible method of desegregating" all-black Drew Junior High School or all-black Miami Northwestern High School on the record then before it, the Court explicitly noted that many of Drew's "students will have attended elementary schools which are desegregated under the modifications heretofore set forth" and that many of Miami

Northwestern's "students will have attended either a desegregated elementary or junior high school" (434 F.2d 1151 at 1157, 1158). Moreover, the Dade County School Board's 1974 Feeder Plan (p. 18) states that Drew Junior High School area students have been assigned to "predominantly white Fisher Junior High during the past several years" and that the closing of all-black Dorsey Junior High resulted in assigning its students to various junior high schools within the county. Many inner-city "post-Dorsey" students then attended predominantly white junior high schools.

There is a crucial difference between the 3,610 black students (School Board Report April 1, 1974 number of students in Drew, Holmes, Olinda and Orchard Elementary Schools) who will attend[5] K-12 in totally black schools under the Feeder Plan challenged herein and the prior situation in which at least some of these students go to white schools part of their school lives and the remainder at least share second-hand (through their classmates who at some point attended desegregated schools) the experiences of desegregated education.

The School Board's stated purpose (Feeder Plan, p. 18) is "to provide the elementary school students residing in this [North Central inner-city] area an opportunity to continue their education with their classmates in junior and senior high school . . ." Obviously the School Board, which is allegedly stabilizing attendance in the inner-city area, is really engaging in deliberate re-segregation. But

[5]This Petition is based on the arguments presented below, although the 1974 Feeder Plan sought to be enjoined by Intervenors is actually in effect now; obviously injunctive relief would apply for the coming 1975-1976 and subsequent school years.

stability does not necessitate discriminatory action: the District Court's Biracial/Tri-Ethnic Committee's March 8, 1974 report to the District Court specifically objected to "locking in a six-school, all-black Northwestern feeder system" and gave the Committee's opinion that Northwestern can be maintained "as a first-class high school" without unstable feeder patterns "if some reasonable and practicable transportation is considered as a desegregation tool . . ."

Moreover, the Feeder Plan challenged herein establishes an inner-city all-black six-school K-12 system while, simultaneously, transporting other black elementary school graduates from the same North Central inner-city area to predominantly white junior and senior high schools which are at least six and as much as twelve miles away; the Feeder Plan also, simultaneously, transports zero white elementary school graduates similar distances to all-black Drew and Miami Northwestern secondary schools.

Achieving stability by adopting a "neighborhood school policy" which resegregates inner-city students is constitutionally invalid under this Court's decisions noted above.

When the duty of conversion "to a unitary system in which racial discrimination would be eliminated root and branch" includes the direction that "whatever plan is adopted will require evaluation in practice" by the District Court, *Green v. County School Board of New Kent County*, *supra*, at 438-440, and practice demonstrates not only partial failure of the 1970 Court-ordered plan but also an intentional resegregative 1974 Feeder Plan, then injunctive and other relief is indicated.

It is clear that the twenty-year-old lessons that "separate but equal" is unconstitutional need relearning by the School Board. The inherent inequality of any separate educational system is not made any less unconstitutional by clouding the issue with new slogans such as "separate but stabilized" or even "separate but better".

2. The premature rejection of consideration of Intervenors' proposed comprehensive desegregation plan(s)[6] for the 1975-1976 (or, *a fortiori*, subsequent) school year conflicts with standards set forth by this Court in *Keyes v. School District No. 1*, 413 U.S. 189 (1973) and *Milliken v. Bradley*, 418 U.S. 717 (1974) concerning appropriate remedies for constitutional violations in school desegregation cases. Even apart from the question of the validity of the inner-city-six-all-black-K-12-school Feeder system raised immediately prior hereto, the District Court's granting of an evidentiary hearing concerning the 1974 Construction Plan precludes such rejection at this posture of the case.

The School Board did not choose to cross-appeal from the District Court's Order setting an evidentiary hearing on the Construction Plan, the Construction Plan was explicitly not considered by the Court of Appeals below, and the evidentiary hearing is scheduled to be held sometime in the future, after final disposition of Intervenors' contentions concerning the Feeder Plan by this Court (Appendix *infra*).

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[6]Contrary to the School Board's fallacious assertions in the Courts below, Intervenors do not now and never have sought fixed racial quotas but instead seek desegregated Dade County schools in which each student body black-white composition is substantially proportionate to the whole system's composition, i.e., with no more than a 10% deviation above or below, for a maximum 20% deviation (see Intervenors' Memorandum of Law to the District Court dated June 3, 1970 and subsequent briefs, oral arguments, etc.). Moreover, Intervenors seek as much desegregation as required by existing law, even if such be less than Intervenors desire.

Intervenors' Supplemental Petition and Reply state their retention of Dr. John A. Finger, the School Plan expert of *Keyes* and *Swann*, *supra*, to prepare a total desegregation plan as well as a second plan using such time/distance guidelines as the District Court below may set. Dr. Finger's "Preliminary Report" (attached to Intervenors' Supplemental Petition as Exhibit D) concludes that he would like to prepare a feasible desegregation plan for Dade County for later presentation to the District Court. Such proposed plan(s) may offer not only feasible desegregation improvements but also more stability and quality education than the School Board presumably desires. Such plan(s) should not now be rejected, unformulated, unformulatable, and sight unseen.

This Court's majority opinion in *Milliken v. Bradley*, *supra*, cogently stated the underlying issue:

> "The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. *Swann*, *supra*, at 16."

Even if the 1974 Feeder Plan is valid, Intervenors' position to the contrary notwithstanding, how can the scope of the remedy be determined and/or any remedy rejected at this posture of the Dade County, Florida school desegregation case when the District Court's July 30, 1974 Order (Appendix, *infra*) indicates that Intervenors demonstrated a prima facie showing of the School-Board-adopted Construction Plan's dismantling of the "unitary" system and an as-yet unscheduled hearing is to be held on the Construction Plan?

No question of a multi-district remedy for single-district *de jure* violations is presented in this case since Metropolitan Dade County *is* a single district with one School Board having responsibility for all public schools in the co-extensive Greater Miami area. Whatever problems arise in Atlanta, Wilmington, Detroit, Louisville, Boston, etc. with respect to scope of remedy are totally different from the situation in Dade County because a full desegregation plan for its approximately one-quarter-black, three-quarter-white public school student body in no way necessitates any involvement by other school districts.

As far as the question of whether "a separate, identifiable, and unrelated section of the school district that should be treated as isolated from the rest of the district" is concerned, *Keyes* case, *supra*, 37 L.Ed.2d at 566, it seems clear to Intervenors that the 1974 Feeder Plan and Construction Plan involve *all* of Dade County:

> ". . . it is obvious that a practice of concentrating Negroes in certain schools by structuring attendance zones or designating 'feeder' schools on the basis of race has the reciprocal effect of keeping other nearby schools predominantly white. Similarly, the practice of building a school . . . to a certain size and in a certain location, 'with conscious knowledge that it would be a segregated school,' . . . has a substantial reciprocal effect on the racial composition of other nearby schools."
>
> *Keyes, supra*, 37 L.Ed.2d at 559

It is, of course, undisputed that the Feeder and Construction Plans involve deliberate and intentional School

Board actions. Although the issue of the School Board's policies and actions as "purposefully segregative" and discriminatory or as "neighborhood school policy" remains hotly disputed (cf. *Keyes, supra*, 37 L.Ed.2d at 565), Intervenors deem the record to date conclusive as to purposeful and intentional discrimination. Intervenors also expect to present additional supporting evidence at the later hearing on the Construction Plan.

Only when the nature and extent of the constitutional violations encompassed by the 1974 Feeder Plan and 1974 Construction Plan are finally determined by the Courts (on the within Petition to this Court and the District Court's subsequent Construction Plan hearing, ruling, etc.) can the proper remedy be assessed.

CONCLUSION

Petitioners respectfully submit that the 1974 Feeder Plan, which seeks to permanently create an all-black school ghetto so that some 3,600 inner-city children will never see a white classmate for the thirteen years of their most impressionable, educable years from kindergarten through twelfth grade, must be struck down. It is further respectfully submitted that this Court should grant certiorari with directions to either permanently enjoin implementation of such Feeder Plan and to require adoption of a comprehensive desegregation plan for the 1975-1976 school year, or, in the alternative, to order full evidentiary hearings on the Feeder Plan and proposed full desegregation plans in the District Court.

Respectfully submitted,

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APPENDIX

APPENDIX

OPINION OF COURT OF APPEALS
(February 28, 1975)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 74-3181

(Filed, February 28, 1975)

HERBERT PATE, ET AL.,
Plaintiffs,

versus

DADE COUNTY SCHOOL BOARD, ET AL.,
Defendants-Appellees,

ALICE LOVE, CARSWELL WASHINGTON, ET AL.,
Intervenors-Appellants,

DADE COUNTY CLASSROOM TEACHERS' ASSOCIATION, INC.
Intervenor.

Appeal from the United States District Court
for the Southern District of Florida

(February 28, 1975)

Before BROWN, Chief Judge, MORGAN and GEE, Circuit Judges.

PER CURIAM:

This case began in August, 1969, when the Dade County School Board invoked the jurisdiction of the federal court to protect itself against an action in the Florida state court by a citizen who sought to enjoin the school board from implementing a desegregation plan it had approved for the 1969-1970 school year. After extensive proceedings over a period of a year, this court in a lengthy opinion reviewed the district court's orders approving a final desegregation plan after requiring further modification to the student assignment element of the plan and thereafter held that the total plan as modified would effectively desegregate the Dade County School System. Pate v. Dade County School Board, 434 F.2d 1151 (5th Cir. 1970), cert. denied 402 U.S. 953 (1971).

After the decision in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) and its companion cases, the district court entered an order on June 14, 1971, outlining the continuing duty of the Dade County School Board to make the desegregation plan work, recognizing its own responsibility to insure that the school system remained unitary, and giving all parties time to object to the school board's 1971-1972 pupil assignment plan. Thereafter, on June 18, 1971, the district court approved the plan and relieved the school board of any duty to obtain prior approval of further changes, and fixed the burden as to any further proceedings as follows:

> "The burden shall be upon the present intervenors, or any other persons hereafter permitted to intervene, to demonstrate to this Court a prima facie case of the School Board's failure to act in accordance with the principles outlined in this

Court's order of June 14, 1971. Jurisdiction is retained for this limited purpose."

At that time, the present appellants not only objected to the 1971-1972 pupil assignment plan, but moved to reopen the case for evidentiary hearings de novo, asserting that the desegregation plan as previously approved by this court was in conflict with the Supreme Court's decision in Swann v. Charlotte-Mecklenburg Board of Education, supra. On June 30, 1971, the district court denied further evidentiary hearings and found that the Dade County School System was a unitary system and complied with Swann v. Charlotte-Mecklenburg Board of Education, supra. The appellants appealed to this court from the district court's orders of June 18 and June 30, 1971, and this court summarily affirmed the district court. Pate v. Dade County School Board, 447 F.2d 150 (5th Cir. 1971), cert. denied 405 U.S. 1064, 92 S.Ct. 1493 (1972).

The record shows that the Dade County School Board has taken effective steps to further the desegregation process. When the board, in 1972, found that the pairings of two junior high schools which had been ordered by this court in its 1970 opinion had not worked effectively, the board grouped a third, virtually all white, school to the originally paired schools in an effort to stabilize the situation. This grouping, which involved additional bus transportation, voluntarily ordered by the board, was very recently before this court, and we approved the board's actions by affirming the dismissal by the district court of a complaint filed by a group of parents. Darville v. Dade County School Board, 497 F.2d 1002 (5th Cir., 1974).

The current proceedings here were initiated on June 20, 1974. In their petition the intervenors in the court below demanded a plenary evidentiary hearing, asserting the hearing was necessary concerning a recent revision by the board of the student feeder plan for one senior high school and a tentative 5-year construction plan which had been approved by the board.

The board filed a motion to dismiss, and the intervenors filed a reply thereto. The district court heard a full and extensive argument which was supplemented by exchange of letters concerning aspects of the construction plan.

On June 30, the district court held that the petitioners had failed to make a prima facie showing under the burden defined in its orders of June 14 and 18, 1971, sufficient to justify action with respect to the high school feeder plan or the demand for consideration of a comprehensive new desegregation plan. The district court scheduled a hearing to consider whether the implementation of the construction plan would adversely affect the existing unitary system. The board has not cross appealed from the portion of the order scheduling a hearing on the construction plan, and since the tentative construction plan is to be the subject of an evidentiary hearing, this construction plan is not an issue in this appeal. The district court's denial of intervenors' claims (a) to enjoin implementation of the board's 1974 feeder plan, and (b) for the adoption of a comprehensive desegregation plan for the 1975-1976 school year is hereby

AFFIRMED.

OPINION OF DISTRICT COURT
(July 30, 1974)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 69-1020-CIV-CA

ALICE LOVE, CARSWELL WASHINGTON, MARGARET WASHINGTON, & THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, INC.

VS

DADE COUNTY SCHOOL BOARD, ET AL

ORDER ON INTERVENORS' PETITION TO IMPLEMENT AND ENFORCE THE COURT'S PREVIOUS ORDER

In its Order entered June 14, 1971, this Court stated:

> Once having disestablished the dual school system and eliminated racial discrimination through official action from the system, there remains vested in the authority of the Court only the responsibility to assure that the school system does not revert to a state-imposed dual school system. See, Swann v. Charlotte Mecklenburg Board of Education, 39 U.S.L.W. 4437 (U.S. April 20, 1971).

Jurisdiction was retained in the above order to assure that the Dade County School system "was continually maintained in a unitary manner."

After briefing and oral argument, the Intervenors were unable to demonstrate a prima facie showing of the

School Board's failure to act in accordance with the principles outlined in the order of June 14, 1971 with respect to the Intervenors' Petition (a) to enjoin implementation of the 1974 Feeder Plan and (b) for adoption of a comprehensive desegregation plan for the 1975-1976 school year. Accordingly, the Petition is denied as to such relief.

A hearing on whether implementation of the 1974 New Construction Plan, as now proposed, would adversely affect the unitary system heretofore attained is scheduled at 1:30 p.m., September 24, 1974 in Courtroom 323, United States Courthouse, 300 NE 1st Avenue, Miami, Florida. A pretrial stipulation shall be filed by counsel in accordance with Local Rule 14. A pretrial conference will be held at 1:30 p.m., September 20, 1974. Intervenors and the School Board may engage in such discovery as may be appropriate for such hearing.

Entered this 30th day of July, 1974.

/s/ C. Clyde Atkins

UNITED STATES DISTRICT JUDGE

cc: Irma Robbins Feder, Esq.
Richard Yale Feder, Esq.
James W. Mathews, Esq.
Maurice Rosen, Esq.
Alfred I. Hopkins, Esq.
Frank A. Howard, Esq.
Fred. Davant, Esq.
Tobias Simon, Esq.
Charles E. Miner, Esq.
Frank Magrath, Esq.

OPINION OF DISTRICT COURT
(August 6, 1974)

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

No. 69-1020-Civ-CA

ALICE LOVE, CARSWELL WASHINGTON, MARGARET WASHINGTON, and THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, INC.,
Intervenors,

vs.

DADE COUNTY SCHOOL BOARD, et al.,
Defendants.

ORDER

The above matter coming on to be heard on the Motion of Intervenors for Certification as a Final Judgment of this Court's prior Order of July 30, 1974 as to enjoining Feeder Plan and adopting a comprehensive desegregation plan and for a stay of the pretrial and trial of the implementation of the 1974 New Construction Plan, as proposed, and Defendant, DADE COUNTY SCHOOL BOARD, having agreed to said Motions and the Court being aware that the July 30, 1974 Order denying relief to Intervenors as to (a) enjoining implementation of the 1974 Feeder Plan and (b) adopting a comprehensive desegregation plan for the 1975-1976 school year was in-

tended as a final judgment on said issues as there is no just reason for delay in entering a Final Judgment on said issues and there appearing sufficient reasons for a stay of the remaining issues pending the outcome of an appeal from this Court's Order and the Court being otherwise fully advised, it is:

ORDERED:

That the Order of this Court entered July 30, 1974 be and is hereby amended to reflect a Final Judgment be entered in favor of the Defendant and against Intervenors with respect to Intervenors' Petition (a) to enjoin implementation of the 1974 Feeder Plan and (b) for adoption of a comprehensive desegregation plan for the 1975-1976 school year and such Final Judgment be and the same is hereby entered, and it is further ordered,

That the hearings and pretrial of the remaining issue on implementation of the 1974 New Construction Plan, as proposed, be and is hereby stayed pending the appeal of the foregoing Final Judgment, and it is further ordered,

That in all other respects the Order of July 30, 1974 be and the same is hereby reaffirmed.

ENTERED, this 6th day of August, 1974.

/s/ C. Clyde Atkins

UNITED STATES DISTRICT COURT JUDGE

Copies furnished to:

IRMA ROBBINS FEDER, ESQ.
RICHARD YALE FEDER, ESQ.
JAMES W. MATTHEWS, ESQ.
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CHARLES MINER, ESQ.
FRED DAVANT, ESQ.
MAURICE ROSEN, ESQ.
ALFRED I. HOPKINS, ESQ.

INTERVENORS' SUPPLEMENTAL PETITION TO THE DISTRICT COURT
(Excerpts pp. 15-24, R. 84-93)

IV

DUAL SYSTEM

A. FAILURE OF COURT ORDERED PLAN

A comparison of the expected racial composition of numerous paired and grouped schools in the Court of Appeals' Opinion and the actual racial composition of such schools as of February 12, 1974 reveals that the Court's plan has not worked realistically and indeed in view of School Board inaction and action, is now hardly working at all.[13]

[13]The expected racial composition was computed by using attendance figures and percentages set forth or referred to in the Court of Appeals' Opinion, 434 F.2d 1151. The actual racial composition is based on the School Board's Report to this Court dated April 1, 1974.

Bunche Park (formerly 100% black), Parkview and Scott Lake (formerly 2% and 1% black) were expected each to become 39% black. Today Bunche Park is 56% black; Parkview and Scott Lake are 48% and 42% black.

Rainbow Park (formerly 100% black) was expected to become 43% black by pairing with (formerly 2% black) Opa Locka. Today Rainbow Park is 67% black; Opa Locka is 26% black.

Young (formerly 85% black) was expected to become 36% black by pairing with Westview (formerly 0% black). Today Young is 65% black and Westview is 62% black.

West Little River (formerly 92% black) and Broadmoor (formerly 1% black) were expected to become 47% black each. Today West Little River is 66% black and Broadmoor is 58% black.

Arcola Lake (formerly 89% black) and Blanton (formerly 13% black) were expected to become each about 53% black. Today Arcola Lake and Blanton are both 65% black.

Holmes Complex (formerly 100% black), Little River (formerly 35% black) and Edison Park (formerly 53% black were expected to become approximately 68% black. Today Holmes Complex is 98% black; Little River and Edison Park are 71% black.

Gladeview (formerly 98% black) was expected to become 40% black by pairing with Hialeah (formerly 0% black). Today Gladeview is 52% black and Hialeah, 29% black.

Lorah Park (formerly 100% black) and Curtiss (formerly 0% black) were expected to become approximately 56% black. Today Lorah Park is 81% black and Curtiss is 57% black.

Allapattah (formerly 99% black) and Santa Clara (formerly 25% black) were expected to become about 70% black. Today Allapattah is 82-83% black and Santa Clara is 64% black.

Douglas (formerly 99% black) was expected to become about 40% black by pairing with Riverside (formerly 1% black) or grouping with Riverside and Southside (formerly 2% black). Today Douglas is 72% black (Riverside and Southside are 32% black and 1% black respectively).

Bethune (formerly 97% black) was paired with Melrose (formerly 3% black) for an expected 49% black result. Today Bethune is 70% black; Melrose is 47% black.

Dunbar and Wheatly (formerly 93% black and 100% black) were expected to become approximately 55% black. Today Dunbar is 69% black and Wheatly is 61% black.

Tucker (formerly 100% black) was expected to become about 52% black by pairing with Dade (formerly 1% black) or grouping with Dade and Coconut Grove. Today Tucker is 80% black; Dade and Coconut Grove are 52% and 56% black.

Miami Jackson Senior High School (formerly 85% black) was expected to become about 60% black through

court-ordered strict adherence to its attendance zones and those of Miami Senior High. Today Miami Jackson is 85% black.

The above demonstrated resegregation pattern does not reflect any significant change in the black-white ratio of Dade County public school children: as of September 28, 1970, there were 59,900 black students and 179,318 white students for a grand total (K-12) of 239,218 and a 25% black/75% white ratio;[14] as of February 12, 1974, there are 64,188 black students and 179,883 white students for a grand total (K-12) of 244,071 and a 26% black/74% white ratio.[15]

The resegregation pattern does demonstrate the unrealistic nature of "partially desegregating" the sixth largest public school system in the country.

The Court of Appeals clearly sought to desegregate Dade County's all-black and virtually all-black schools by establishing about 40% black student bodies therein. For example, said Court's pairing and grouping alternatives for Douglas yielded an expected racial composition of approximately 40% black; the Court deemed such "a desirable racial composition" (434 F.2d 1151 at 1156). Similarly, said Court's pairing or grouping choices for B.T. Washington Junior High envisioned an expected 36% to 46% black student body; the Court stated that "the resulting racial composition is desirable" (434 F.2d 1151 at 1157). On the other hand, the Court of Appeals was not pleased with the 68% black expected racial composition figure for Holmes Complex, and noted "it is possible

[14]School Board Report to this Court dated December 4, 1970, p. 2.

[15]School Board Report to this Court dated April 1, 1974, p. 2.

that the board may devise a more desirable plan to desegregate Holmes Complex before the commencement of the 1970-1971 school year" (434 F.2d 1151 at 1155). In like vein, unsatisfied with the Allapattah 71% black expected racial composition figure, the Court of Appeals stated "it is possible that the board may devise a more desirable method of desegregating the Allapattah school before the commencement of 1970-1971 school year" (434 F.2d 1151 at 1156). (B. T. Washington, unlike most of the schools desegregated by Court-orders, has remained desegregated and is 38% black today; Allapattah, like most of the schools desegregated by Court-orders has resegregated and is now 82-83% black).[16]

Comparing desegregation in Dade County with desegregation in other urban Florida counties once again reveals how relatively little Dade has achieved. According to a recent Senate Report setting forth "Black-student isolation in large city school districts, ranked by percentage of black students in the district"[17] of the 9 Florida counties covered Dade ranked 9th in the percentage of

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[16]School Board Report to this Court dated April 1, 1974, pp. 17 and 14.

[17]Emerson, Haber and Dorsen's Political and Civil Rights in the United States, 1973 Supplement to Volume 2, pp. 111-116 at 114-115, quoting from "Select Committee on Equal Educational Opportunity", S. Rep. No. 92- , 92d Cong. 2d Sess. 102-104, 110-111, 114-117 (1972), Table 7-16.

black students attending 50 to 100% black public schools in 1971:

County	% black	50 to 100%		
	1971	1968	1970	1971
Hillsborough	19.5	81.7	76.6	2.2
Pinellas	16.3	78.3	54.5	5.2
Polk	22.1	67.3	27.5	20.1
Broward	23.3	85.5	47.9	21.3
Palm Beach	28.6	81.4	74.9	37.1
Orange	18.4	79.9	59.3	47.7
Escambia	28.4	77.5	58.7	57.6
Duval	31.1	87.4	74.4	64.0
Dade	25.7	87.6	78.3	77.0

The 80-100%, 90-100%, and 100% black school statistics do not yield much comfort. Dade ranked seventh in the middle category, eighth in the third, and once again, ninth in the first category:

County	80-100%			90-100%		100%		
	1968	1970	1971	1968	1970	1968	1970	1971
Hillsborough	77.4	62.8	.6	73.3	49.4	64.3	11.3	0
Pinnellas	73.2	20.9	0	72.1	20.0	25.9	4.8	0
Polk	66.7	12.1	11.7	66.7	11.4	66.7	0	0
Broward	79.7	41.1	8.0	79.7	39.2	68.9	15.8	2.3
Palm Beach	79.5	40.6	10.8	76.2	29.4	72.3	0	0
Orange	77.1	52.0	28.3	77.1	33.3	77.1	16.6	4.9
Escambia	71.3	16.6	15.2	70.0	3.8	70.0	0	0
Duval	87.4	57.5	38.2	87.4	54.9	76.7	37.0	23.0
Dade	82.0	53.1	53.2	80.7	41.9	48.6	12.3	12.9

Moreover, the percentage-black and number-of-students figures contained in the School Board's Report to this Court dated April 1, 1974 show that as of February 12, 1974 Dade County has 59.2% of its black public school students in 50-100% black schools, 27.0% in 80-100% black schools, 19.8% in 90-100% black schools and 15.7% in 100% black schools. Thus Dade in 1974 is far behind

many other Florida counties three years ago and, perhaps even more significant, the percentage of blacks in all-black Dade County schools has actually increased since 1971.

B. SCHOOL BOARD DISCRIMINATORY ACTION AND INACTION

Defendant School Board has consistently placed the burden of desegregation on the black community, closing black schools[18] or downgrading black Senior Highs to Junior Highs,[19] failing to construct schools so as to prevent additional segregation and/or resegregation,[20] and bussing large numbers of black secondary students from the inner-city to predominantly white schools but not vice-versa.[21] Such placing of the burden on the minority group is prohibited by law. See e.g. Cisneros v. Corpus Christi Independent School District, 5th Cir. 1972, 467 F.2d 142 at 153, cert. den. 413 U.S. 920; United States v. Texas Education Agency, 5th Cir. 1972, 467 F.2d 848 at 885; Stout v. Jefferson Board of Education, 5th Cir. 1973, 483 F.2d 84 at 86; Davis v. Board of School Commissioners of Mobile County, 5th Cir. 1973, 483 F.2d 1017 at 1021-1022; Bell v. West Point Municipal Separate School District, 5th Cir. 1971, 446 F.2d 1362; Lee v. Macon County Board

[18]See e.g. Dorsey Junior High

[19]See e.g. B. T. Washington and G. W. Carver

[20]Has one new school been constructed since 1970 which has a student body with a black/white ratio similar to that throughout the school system?

[21]For example: inner-city black students are bussed across Biscayne Bay to Fisher Junior High, Nautilus Junior High and Miami Beach Senior High on Miami Beach. No Miami Beach students are bussed to Drew Junior High or Miami Northwestern Senior High, both 100% black and both under capacity according to the 1974 Feeder Plan (pp. 27 and 29).

of Education, 5th Cir. 1971, 448 F.2d 746 at 753-754; Mims v. Duval County School Board, 5th Cir. 1971, 447 F.2d 1330 at 1331-1332.

Defendant School Board has disregarded the Court of Appeals' direction to "appraise the system in the light of actual conditions and experience and . . . make whatever changes are required to assure the maintenance of a unitary system" (434 F. 2d 1151 at 1158). Defendant School Board has ignored this Court's warnings in its June 14, 1971 and August 16, 1972 Orders to the effect that the Board's continued inaction in the face of threatened resegregation would yield an unconstitutional reestablishment of the dual school system. Defendant School Board has continually rejected the Bi-Racial/Tri-Ethnic Advisory Committee's 1972 conclusion that Dade County school desegregation was "degenerating" and that the "danger of resegregation" was inherent in sticking to the status quo because "[w]ithout full desegregation, the unitary status will remain in constant jeopardy."[22] Defendant, School Board has explicitly rejected the so-called "15-40" Plan prepared at its direction, has explicitly rejected the so-called "Phase II" proposals for some relatively minor increased desegregation, and has explicitly rejected any policy directed towards seeking countywide desegregation at any time in the future (see Sec. II, supra). Defendant School Board "abandoned" the prior Feeder Plan "found objectionable" by Intervenors and the Bi-Racial/Tri-Ethnic Advisory Committee, thus leading this Court to conclude that there was "no basis for conducting an evidentiary hearing" requested last spring by Intervenors (see this Court's Order dated March 27, 1973).

[22]June 1972 Report to this Court, pp. 1 and 13.

Defendant School Board, having deliberately and successfully avoided Court action last spring by a do-nothing policy in the face of the Committee's objections and Intervenors' Motion for Hearings on the proposed prior Feeder Plan, adopted the present Feeder Plan quickly and quietly . . . so quickly and quietly that (1) Intervors were unaware of the proposed plan until almost the day it was adopted, (2) the Advisory Committee "did not have an adequate opportunity to review the proposed changes",[23] and (3) several School Board members expressed their unfamiliarity with the plan, two of whom voted against adoption on the ground of insufficient time to study it. Thus, Defendant School Board's constant inaction over the past few years with respect to increasing desegregation and/or preventing resegregation recently culminated in two clearly unconstitutional affirmative actions, the 1974 Feeder Plan intentionally segregating a meaningful segment of the black public school population throughout their school life[24] and a 1974 Construction Plan intentionally enhancing segregation rather than desegregation.[25]

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[23]Report to this Court dated March 8, 1974, p. 3.

[24]"It is obvious that a practice of concentrating Negroes in certain schools by structuring attendance zones or designating 'feeder' schools on the basis of race has the reciprocal effect of keeping other nearby schools predominantly white." Keyes v. School District No. 1, 1973, 413 U.S. 189, 93 S.Ct. 2686, 37 L.Ed.2d 548 at 559 and see fn. 12 quoting with approval Judge Wisdom's opinion in United States v. Texas Education Agency, Cir. 1972, 467 F.2d 848 at 888 to the effect that "Infection at one school infects all schools." See also Cisneros v. Corpus Christi Independent School District, 5th Cir. 1972, 467 F.2d 142 at 146-147.

[25]Keyes, supra, at 559-560; Swann v. Charlotte-Mecklenburg Board of Education, 1971, 402 U.S. 1, at 20-21, 91 S.Ct. 1267, 28 L.Ed.2d 554; Davis v. Board of School Commissioners of Mobile County, 5th Cir. 1972, 483 F.2d 1017 at 1021-1022.

Defendant School Board's persistent excuse for failure to effectuate true desegregation has been the spectre of massive busing. At the present time however, less than one-sixth of the public school children bused in Dade County are bused specifically for desegregation purpose, i.e., under court-orders. While numerous formerly all-white or almost all-white schools have been desegregated as a matter of fact by extensive busing (purportedly required by Defendant School Board to alleviate overcrowding), little such busing, if any, has been undertaken to desegregate all-black or virtually all-black schools. It should be noted at this point that rejection of all elementary school busing as a means of effectuating desegregation was explicitly disapproved in United States v. Texas Education Agency, supra, at 874. See also Henry v. Clarksdale Municipal Separate School District, 5th Cir. 1973, 480 F.2d 583, 585.

Intervenors submit that the amount of actual desegregation of formerly all-white or almost all-white schools which has occurred in the past few years through the use of busing demonstrates as a matter of practical fact the feasibility of similar desegregation of presently all-black or almost all-black schools through the use of busing. Cf. Lee v. Macon County Board of Education 5th Cir. 1971, 448 F.2d 746 at 754-755 and Henry v. Clarksdale, supra. Such feasibility was not so demonstrated at the time of the Court of Appeals' controlling opinion herein and said opinion left many schools all or virtually all-black because said Court was presented with "no feasible method of desegregating these schools" (434 F.2d 115, at 1155, see also 1154-1158).

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in the

Supreme Court

of the

United States

OCTOBER TERM, 1974

NO. 74-1493

ALICE LOVE, et al.,

Petitioners,

vs.

DADE COUNTY SCHOOL BOARD, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF THE CASE

1. Introduction

The desegregation of the Dade County public school system, the sixth largest school district in the nation located within the most extensive urban-metropolitan area in Florida, has been a complex and evolving process over the past five years. The petitioners' statement of the case is inadequate as a presentation of the background and context of the most recent proceedings which are now the subject of their petition for certiorari. This is the fourth attempt by the American Civil Liberties Union of Florida and other intervenors, since 1970, to force a wholesale reopening of this case, with the objective of imposing a systemwide master plan of racial quotas or balances in all schools in Dade County.

Petitioners have not asked that the record in the Court of Appeals be transmitted to this Court, but have elected to make their presentation based upon their interpretation of the record, plus a few selected excerpts from their own Petition for Supplemental Relief originally filed in the District Court, which they have reprinted in the appendix to their petition to this Court. We believe that the issues cannot be fully understood without reference to the pleadings below, including the charts and exhibits which cannot be reproduced in appendix form to this brief. Accordingly, we have requested that the entire record which was before the Court of Appeals be certified and transmitted, in accordance with this Court's Rule 21. References to the record herein will be according to the index and pagination of that official record on appeal, as prepared by the clerk of the District Court. (We note that petitioners' references are apparently to the incomplete "reproduced

record" which they filed with the Court of Appeals, and their page references are thus out of phase with the numbering assigned by the clerk.)

1. Background and History

This case began in August, 1969, when the School Board invoked the jurisdiction of the federal court to protect itself against an attack in the state court by a citizen who sought to enjoin the Board from implementing a desegregation plan it had approved for the 1969-1970 school year. Prior to that, over a period of about ten years, the Board had voluntarily taken moderate steps to desegregate the school system. The 1969-1970 plan was found insufficient by the District Judge, and after a labyrinth of proceedings extending over a period of a year, the Fifth Circuit in a careful and exhaustive opinion reviewed the District Judge's orders approving a final desegregation plan, required further extensive modifications to the student assignment elements of the plan, and thereupon held that the total plan as modified would effectively desegregate the Dade County school system. *Pate v. Dade County School Board*, 434 F.2d 1151 (5th Cir. 1970), *cert. den.* 402 U.S. 953, 91 S.Ct. 1613 (1971). The petitioner American Civil Liberties Union had urged fixed racial ratios in every school, a contention rejected by the District Judge *(Pate, supra* at page 1160) and by the Court of Appeals.

One year later, after the decisions in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267 (1971) and its companion cases, the District Judge entered an order on June 14, 1971 (R. 1), outlining the continuing duty of the School Board to make the desegregation plan work, recognizing his own responsibility

to assure that the school system remained unitary, and giving all parties an opportunity to object to the Board's 1971-1972 pupil assignment plan. On June 18, 1971 the District Judge approved the plan, relieved the Board of any duty to obtain prior approval of further changes, and fixed the burden as to any further proceedings as follows (R. 5):

> "The burden shall be upon the present intervenors, or any other persons hereafter permitted to intervene, to demonstrate to this Court a prima facie case of the School Board's failure to act in accordance with the principles outlined in this Court's order of June 14, 1971. Jurisdiction is retained for this limited purpose."

At this juncture the present petitioners had not only objected to the 1971-1972 pupil assignment plan, but had moved to reopen the case for evidentiary hearings *de novo*, contending that the overall desegregation plan as approved by the Court of Appeals was in conflict with the principles laid down by this Court in *Swann* and its companion cases. The District Court on June 30, 1971 denied further evidentiary hearings, finding that the Dade County school system was in truth unitary in light of *Swann* (R. 7). The petitioners took an appeal from the last-mentioned two orders of June 18 and 30, 1971. The Fifth Circuit affirmed summarily under its Local Rule 21—and this Court refused to grant a petition for certiorari from that decision. *Pate v. Dade County School Board*, 447 F.2d 150 (5th Cir. 1971), *cert. den.* 405 U.S. 1064, 92 S.Ct. 1493 (1972).[1]

[1]For a fuller account of the early history of the case, we refer the Court to the School Board's Brief and Appendix filed in that certiorari proceeding, which appeared in this Court as *Alice Love v. Dade County School Board*, case No. 71-918, October Term, 1971.

The next attempt by the petitioners to require racial balances came in 1973, but was mooted when the School Board, under threat of the attempt to force new plenary hearings, discontinued consideration of tentative additional steps (R. 297).

Ironically enough, while the present petitioners have recurrently sought to reopen the case on the conception that the school system is not unitary, the School Board has taken affirmative steps to further the desegregation process which have required it to defend (successfully) against attacks from the other end of the spectrum which have challenged the Board's actions as going *too far*. Thus, the School Board in 1972 found that the pairing of Miami Springs Junior High and Brownsville Junior High, which had been ordered by the Fifth Circuit in its 1970 opinion, had not worked effectively, and so grouped a third virtually all-white school to the original paired schools in an effort to stabilize the situation. The City of Miami Springs complained of this and petitioned to intervene. The Board resisted the attempt and the District Judge denied the petition (R. 292). In that order, while cautioning the Board as to its duties, the court said:

> "The Court wishes to recognize the substantial efforts of the Board to comply with its continuing responsibilities under the orders of this Court. It is clear that a good faith effort to accomplish further desegregation, although having already achieved unitary status, has been made."

The same grouping, which involved additional bus transportation voluntarily ordered by the School Board, was before the Court of Appeals in 1974. That Court found

the Board's grouping to be "an affirmative action to promote desegregation within a unitary school system," and affirmed the dismissal by the District Judge of a complaint filed by a group of parents and the City of Hialeah. *Darville v. Dade County School Board*, 497 F.2d 1002 (5th Cir. 1974).

3. The Latest Proceedings Below

Against this background, the current proceedings were initiated by a "Petition for Supplemental Relief . . . (etc.)" filed June 20, 1974, in which the intervenors in the lower courts once again demanded plenary evidentiary hearings, with the purpose of forcing the adoption of complete and comprehensive new desegregation plans for the entire county school system (R. 62). As a basis this time for demanding more hearings, the Petition focused upon a recent revision by the School Board of the student feeder plan for one senior high school, and upon a tentative five-year construction plan approved by the Board.

The School Board filed a Motion to Dismiss and factual Response, with exhibits attached, and *sworn to* by the school system's Director of the Office of Equal Educational Opportunity (R. 232). The intervenors filed a reply (R. 281), and the District Judge heard full and extensive argument, supplemented by an exchange of letters concerning aspects of the construction plan (R. 306-319).

The District Court held that the petitioners had failed to make a *prima facie* showing, under the burden defined in his orders of June 14 and 18, 1971, sufficient to justify action with respect to the high school feeder plan, or the demand for consideration of a comprehensive new deseg-

regation plan. However, the court did schedule a hearing to consider whether implementation of the construction plan would adversely affect the existing unitary system (R. 298, Pet. appendix 5).

On motion the court certified its rulings as final judgments under Rule 54(b), and petitioners appealed. The School Board did not cross-appeal from the portion of the order scheduling a hearing on the construction plan. The Court of Appeals affirmed (Pet. appendix 1), after summarizing the history of the case in its opinion and observing:

> "The record shows that the Dade County School Board has taken effective steps to further the desegregation process."

4. The Facts Presented to the Lower Courts

Petitioners' statement of the facts ingenuously consists only of selections from their Petition for Supplemental Relief filed below, and ignores the comprehensive and sworn Response filed by the School Board. Our argument to the courts below not only challenged the sufficiency of the Petition on its face, but also went to the merits of the contentions, in the light of the factual explanations, supported by data in exhibits attached, contained in the Board's Response. The petitioners never disputed the accuracy of the Board's factual representations or statistical exhibits, except for some differences which developed after the hearing in the District Court concerning expected racial attendance in schools yet to be built. These differences are not material here, because the District Judge *has* ordered an evidentiary hearing to inquire into the

Board's construction plan. As for the issues before the Court of Appeals and now being repeated to this Court —the high school feeder plan and the question of justification for new comprehensive desegregation planning—the material facts are substantially undisputed, and were so treated in the proceedings below. Petitioners filed no sworn traverse of any of the Board's factual submissions, nor did they at any time during or after the hearing proffer testimony as being necessary to a decision by the District Judge. Procedurally, therefore, the matter was properly decided upon the whole record, as is clearly permissible under Rule 12(b) of the Federal Rules of Civil Procedure.

We believe that it is unnecessary to try to restate the facts in full, which would simply involve a repetitive paraphrasing of the explanatory and statistical content of the Board's Response. The full facts and circumstances relating to the claims made in the Petition below can only be gathered from the Response, which we urge the Court to read in full (R. 232-263). For summary purposes here, we will only point out the essentials of the Response, to balance the petitioners' astigmatic presentation of the facts in their petition.

A. 1974 Feeder Plan

The Petition below claimed "intentionally segregative School Board action" in its approval of a revised student feeder plan for Miami Northwestern Senior High School.

The Response explains the new plan, its purposes and effects, in light of the history of this school and its tradi-

tional elementary and junior high "feeder" schools located in the virtually all-Negro north central district of the school system. The Response points out:

> (a) The purpose of the plan is racially neutral —to rectify a fragmented and bizarre student assignment system, unique within the school district, which has operated to the detriment of the black children involved, and jeopardized the continuance of Miami Northwestern Senior High School.
>
> (b) The effect of the plan is racially neutral —the students involved are all black, and there is no correlative reassignment or readjustment of white students to separate the races.
>
> (c) Although the feeder plan makes for an all-black student flow in the schools to feed Miami Northwestern Senior High, it gives those students a normal and vastly simplified progression of schools—and by taking many black students *out* of the old Miami Northwestern flow pattern, it places those students in desegregated junior and senior high schools.
>
> (d) The new plan does not disturb the existing desegregated schools in the area, and in fact will improve the racial mix in some of these.
>
> (e) Given the intractable fact of Negro residential isolation in north central Miami—a fact recognized from the beginning by the District Judge and by the Fifth Circuit as preventing

feasible desegregation of many of the schools involved in the feeder plan—the new plan simply improves the educational environment and progress of the black children involved.

(f) Nothing in the feeder plan restricts or prevents students from exercising their right to transfer under the Board's long-standing majority-to-minority transfer policy.

B. The Board's Construction Plan

Since the tentative construction plan is to be the subject of an evidentiary hearing, and was not an issue in the appeal below, it seems unnecessary to burden this Court with a premature analysis here. If it is defective it can be corrected, but it by no means follows, as petitioners suggest, that flaws in tentative construction planning must lead to new all-out comprehensive redesigns for countywide desegregation.

C. "Dual System"

The petition, under the suggestive heading "Dual System," presents a series of assertions that the Dade County school system is retrogressing, in an attempt to argue the conclusion that we are back to an old-fashioned dual system of schools. The Petition for Supplemental Relief in the District Court tried, for example, to show that the unitary plan approved by the Fifth Circuit in 1970 has "failed," by selecting some 36 schools (out of a total of 60 originally paired and grouped) and complaining that black student percentages have exceeded original predictions.

The Board's Response shows (1) no School Board action or default is alleged to have caused these variations; (2) majority black schools are not *per se* segregated; (3) only one of the schools listed is over 85% black. The Response, then, by Exhibits III and IV attached, demonstrates (1) when *all* grouped and paired schools are considered, the picture in terms of racial mixture is quite satisfactory; (2) the School Board by voluntary, affirmative action has *added* 11 schools to the network of paired and grouped schools, with substantial desegregation having resulted in every case. Going further, the Response by Exhibit IV attached displays a panoramic view of the progress of desegregation in the whole school system from 1968-1973. Of particular interest—the number of 90-100% black schools has remained stable since 1970, the year the Court of Appeals ruled the system to be unitary, while 100% white schools have decreased from 33 in 1970 to 10 in 1973. Concurrently, the number of schools enrolling 1—30% black students has increased from 106 in 1970 to 132 in 1973.

The Petition for Supplemental Relief filed below then contains a section called "School Board Discriminatory Action and Inaction" which is largely emotional argument. Its factual assertions when boiled down relate to the closing of one black school and conversions of two others. The Board's Response simply points out that these were all accomplished, for good reasons, before or during the litigation leading to the unitary status achieved in 1970, and so are irrelevant matters.

ARGUMENT

REASONS FOR DENYING THE WRIT

1. **Post-Unitary Jurisdictional and Remedial Standards**

The essential issues presented by the petition are the same as those argued to the lower courts—whether, upon the whole record, the District Judge was required either to enjoin the School Board's revised feeder plan for Miami Northwestern Senior High School, or to reopen this litigation and begin again with countywide desegregation schemes as if the history of the past four years were nothing.

Since the Dade County school system is and has been unitary since 1970, it is important first to analyze the method and implications of the petition, in the perspective of the history of this case.

As we noted earlier, the Petition for Supplemental Relief filed below was the latest in a series of persistent attempts by these intervenors (petitioners) to reopen the entire desegregation process in the public schools of Dade County, and to induce the lower court to impose a countywide system of racial balances in the schools. The Petition ignored the history of this case, the principles laid down by this Court, and the overall working experience of the school system, in its dogmatic new offensive directed toward racial quotas.

The Dade County school system, when declared unitary in 1970, contained some all-white and all-black schools, and other schools of varying racial percentages susceptible of criticism by the purists. The desegregated school

system was and is a compromise between ideals and practicalities, as most things in life are. Nevertheless, the system was held unitary, in spite of petitioners' demands at the time for racial quotas in all schools. *Pate v. Dade County School Board*, 434 F.2d 1151 (5th Cir. 1970), *cert. den.* 402 U.S. 953, 91 S.Ct. 1613 (1971).

In 1971, after the landmark decision in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267 (1971), these petitioners sought to reopen the case, contending that the District Judge and the Court of Appeals had failed to apply correct legal principles in approving the Dade County school system as unitary. The District Judge rejected the demand, the Fifth Circuit summarily affirmed, and this Court denied certiorari. *Pate v. Dade County School Board*, 447 F.2d 150 (5th Cir. 1971), *cert. den.* 405 U.S. 1064, 92 S.Ct. 1493 (1972).

In 1973, another attempt to reopen proceedings and force hearings on plans for racial quotas in the schools was aborted when the School Board, possibly reacting to the threat of disruptive litigation, dropped consideration of certain revised student feeder arrangements, and other tentative plans for additional steps in the desegregation process.

Petitioners' efforts in the last few years, therefore, might be credited with having had the effect of chilling additional measures which might otherwise have been taken by the School Board to improve, by gradual steps, its desegregated system. Petitioners doubtless see this as a virtuous result, from their fixed position demanding racial quotas, or proportions, in all schools. We disagree, and we think it necessary that this position be seen for

what it is—a rigid and uncompromising doctrinaire effort to restructure the entire school system to suit these petitioners' conceptions of "desirable" racial balances, heedless of the substantial progress (admittedly imperfect) made and being made by the Board against complex pressures and counterpressures. The result sought is clearly not required by the law, and their recurrent attacks upon the school system serve only to cloud the issues, stir needless suspicions, and dampen the Board's initiative as it seeks ways to improve the educational opportunities for all students. As the Court of Appeals and the District Judge have both explicitly recognized, this case has never presented the picture of a recalcitrant school board resisting desegregation and trying to evade its constitutional obligations. On the contrary, the Dade County School Board has not only accepted and carried out the mandates of the courts below, it has acted affirmatively, in the face of popular and political opposition, to further desegregation goals. By voluntarily adding schools to those originally paired and grouped by court order, the Board has successfully extended desegregation within the system. By adjusting court-ordered school pairing and requiring additional busing (hardly a popular move these days) the Board has demonstrated its determination to maintain its unitary system, as the Fifth Circuit has recently had occasion to witness and approve. *Darville v. Dade County School Board*, 497 F.2d 1002 (5th Cir. 1974).

The apparent design of the current petition is to attempt to convince the Court that the School Board, in revising one senior high school feeder plan, and/or in approving a tentative construction plan, had acted to reestablish a dual system, and thus—presto!—the slate is clean, four years of history and struggle are to be ignored,

the judgment of the Court of Appeals and the subsequent supervision by the District Court are for naught, and we must start all over again and allow Dr. Finger to give us a fresh master plan for racial balances throughout the county.

This, of course, is nonsense. If the School Board has perchance mistaken its way with respect to the feeder plan, or the construction plan, to the extent of constitutional violations (which we strongly deny), then corrective action should and must be taken, in order to carry out the charge of the Court of Appeals that we "assure the maintenance of a unitary system". It does not follow at all that the whole school system must be reorganized.

As we pointed out in our Statement of the Case, the District Court, in its order of June 14, 1971, laid down principles reflecting its limited continuing responsibility to monitor the unitary school system in Dade County, and by its order dated June 18, 1971, the court stated that henceforth:

> "... The burden shall be upon the present intervenors, or any other persons hereafter permitted to intervene, to demonstrate to this Court a prima facie case of the school board's failure to act in accordance with the principles outlined in this Court's order of June 14, 1971. Jurisdiction is retained for this limited purpose."

This order was the subject of the 1971 appeal, and was affirmed. It therefore became the law of the case insofar as it defined the burden placed upon these petitioners with respect to any attempts to challenge the School Board's

continuing supervision and maintenance of its unitary school system. By the same order, it is apparent that the District Judge recognized and stated that his jurisdiction is now limited in scope, and may be invoked only to correct School Board actions or defaults which are shown to threaten the unitary status of the system.[2] This is quite a different jurisdictional situation than was the case before the school system was declared unitary—and rightly so. Once the judicial desegregation process had been completed and the entire county school system had been held to meet constitutional requirements, the School Board was and is entitled to be free of endless attempts by disappointed parties or new intervenors to force further wholesale reevaluations and revisions. This was the clear teaching of the *Swann* case, when this Court set the guidelines for judicial authority after a school system had attained unitary status:

> "Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the

[2]The District Judge maintains continuing contact and scrutiny, however. A court-appointed BiRacial/Tri-Ethnic Committee reviews and reports to the Court upon the School Board's plans for student assignments, school site selections and other actions affecting the status of desegregation. In addition, the School Board files comprehensive semi-annual reports with the Court, reflecting in great detail the racial distributions of students and faculty, the workings of the Board's majority-to-minority transfer provisions, proposed construction plans, and other statistics relating to the maintenance of desegregated facilities.

> school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary." (*Swann, supra*, 91 S.Ct. 1267 at 1284).

The allegations in the Petition for Supplemental Relief filed below, when stripped of their emotional rhetoric and tested by the full factual context provided in the Board's sworn Response, failed entirely to make a *prima facie* showing of School Board action to reestablish a dual school system, and thus it failed the jurisdictional test set forth in the District Court's order of June 18, 1971.

Further, it seems clear that petitioners' burden can be no less than to show a constitutional violation in order to justify remedial action, much less a total reopening of the litigation as they have demanded. Judicial powers may be exercised only on the basis of a constitutional violation, and the courts have no authority to substitute their judgment for that of a school board. *Swann, supra*, 91 S.Ct. 1267 at 1276. If this is true in the initial testing of a school system against the requirements of the Fourteenth Amendment (as was the case in *Swann*), it must be at least as true and binding upon the lower court here as it contemplated a system already thoroughly reorganized and long operating as unitary under judicial guidance.

Finally, on the question of the scope of remedial jurisdiction, this Court has plainly held that the remedy in each case is to be fitted to the size of the problem:

> "The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. *Swann, supra,* at 16."
>
> *Milliken v. Bradley,* 418 U.S. 717, 94 S.Ct. 3112, 3127 (1974).

Petitioners completely disregard this principle, and even try to stand it upside-down by claiming (Petition p. 17) that the District Court, in deciding to hold a future hearing to examine the School Board's tentative construction plan, has found a *prima facie* violation to exist. This is exactly what the District Court has *not* found, and the School Board is confident that no such violation can be shown when the hearing is held. Our point here is that even if some aspects of the construction plan should be disapproved, the remedy would properly be limited to the correction of the perceived defects.

Accordingly, it remains for us to examine the record, to see whether or not petitioners met these jurisdictional-remedial tests in their objections to the revised senior high school feeder pattern, or in their demand for a new "comprehensive desegregation plan." It will be our purpose to show that nothing approaching resegregative action in violation of constitutional principles has been suggested by the School Board's actions, and that in truth the history of the desegregation process in Dade County shows steady *improvement* in the unitary structure, rather than any basis for wholesale reconstruction of the system.

2. **The School Board's Revision of the Feeder Pattern for Miami Northwestern Senior High School was a**

Normal and Needed Administrative Correction, Racially Neutral and Having No Adverse Effect on the Unitary System.

The petition attempts to characterize the School Board's revised feeder plan for Miami Northwestern Senior High School as a violation of the 1970 decision of the Court of Appeals, and/or an "intentionally segregative" action rendering the Dade County school system a "dual system." The Court of Appeals, by its decision below, obviously held that the Board's revision of the feeder plan did not run afoul of that Court's mandate.

It must first be observed that this high school, as well as Drew Junior High, its junior high feeder school, as well as six elementary schools which have traditionally fed students to Miami Northwestern Senior High, are now all-black and were all-black when the system was ruled unitary in 1970. The Court of Appeals held then that this cluster of schools in the central Negro residential district of Miami simply could not feasibly be desegregated. See *Pate, supra*, 434 F.2d 1151 at 1155, 1157, 1158.

Residential patterns have not changed, and the problem of these schools remains as intractable as ever. The question, then, is whether in administering these schools *as they are* (not as they might be in the best of all possible worlds) the School Board may make reasonable and racially neutral adjustments in student assignments, to correct irrational and educationally unsound feeder arrangements which have operated to the detriment of the black children involved. If not, then the Board can easily return to the old outlandish feeder system. When the new feeder pattern is understood, however, a forced return to the old

system cannot be justified except on the spurious theory which underlies appellants' argument—that black children attending school with other black children is always and in every case bad and impermissible. The Court of Appeals did not accept that theory in 1970, and the School Board's 1974 action in revising the Miami Northwestern feeder pattern simply dealt with existing realities and sought to improve the educational opportunities for the children in the entire complex of schools affected. Under the old feeder arrangements the children were in effect being penalized because they are black, by being subjected to fragmented assignment patterns unique within the school system and unjustifiable on any basis except in terms of temporary racial mixture for some of the students. The new feeder system comes to grips with reality and provides a stable flow for some of the children, albeit within one-race schools, while concurrently placing the rest of the children within a stable flow through desegregated junior and senior high schools. Petitioners' claim that children are being "locked in" to all-black schools ignores the fact that the feeder plan also "locks out" the black students from elementary schools now *removed* from the flow to Drew Junior High and Miami Northwestern Senior High. (See Exhibit II to the School Board's Response filed below, R. 250).

The reasons for the new feeder pattern and its effects have been set forth in the Response filed below, with its Exhibits (R. 232-263). Accordingly, this brief will not repeat what is there explained in full. We will simply point out that under the feeder plan Olinda, Drew, Holmes and Orchard Villa Elementary Schools will feed Drew Junior High School which will feed Miami Northwestern Senior High School. All of these elementary schools except

Holmes are presently 100% black elementary schools. Children from all of these elementary schools except Holmes were already feeding Drew Junior High School, which has been the primary feeder for Miami Northwestern Senior High School. It is apparent that none of these schools will change in racial composition except for Holmes Elementary School, which will go from about 98% black enrollment to an estimated 99% black enrollment. A change of an estimated one (1%) percent (about eight children) in enrollment can hardly be seen as state action designed to enforce segregation.

It is also apparent that the change in the feeder plan does not affect any white students. Drew and Northwestern are now 100% black schools, and always have been. Under the new plan, they will continue to be 100% black schools. The children being channeled to these schools are necessarily black children. It is not possible to segregate white students from black students when the only students involved are black students. It is simply not possible to view this feeder plan as in any way segregative.

We take strong exception to statements in the petition to the effect that black children are being "guaranteed" an all-black education. Petitioners are well aware of the school system's flexible majority-to-minority transfer policy, which truly guarantees that no child need go to a school where his race is in the majority. These children are in no sense being sentenced, as petitioners imply. They are simply placed in a logical flow with their classmates to (1) one junior high school (a good and modern junior high school, by the way) rather than to a hodgepodge of schools, and (2) one senior high school, which

both community and School Board very much want to preserve and strengthen.

Petitioners try to claim that the School Board is placing the burden of desegregation on black students only, by referring to certain students who are transported under the feeder plan to (desegregated) junior and senior high schools. As the Board's Response shows, these students have in the past also been transported, because Dorsey Junior High, their original (black) junior high school was closed in 1970 before the school system reached unitary status. There is nothing new in this transportation plan, and no corresponding need to cross-bus white students, with no junior high school to receive them. In addition, the surrounding senior high complexes are already desegregated (see Exhibit I to Response filed below, R. 246-249) and thus cross-busing to make racial mixes in the inner-city black schools is no more feasible now than it was in 1970.

Petitioners further complain that they were denied an evidentiary hearing on the new feeder plan. In the first place, the facts and data before the lower courts with respect to the plan were not in dispute—only the arguments and conclusions offered by the parties conflicted. It is obvious that petitioners either misunderstood or misinterpreted the nature and effect of the plan, and in any event were primarily interested in trying to use it as a device to serve their purpose of procuring a plenary reopening of the entire litigation. The courts below had a full development of the facts and circumstances in the record, and no real need for more hearings. The District Court's legal conclusion (that the plan does not evidence reversion toward a dual system) was simple enough, and amply supported.

The feeder plan can in fairness only be seen as it is intended—an administrative rearrangement which straightens out a mess. In the judgment of the Board, it is for the best educational benefit of all the students affected, and in the best interests of improving a high school which everyone wants to keep. The black students in the feeder plan may opt out if they wish, and at any time. For the other side of the coin, the black students who are simultaneously excluded from the Northwestern feeder plan are fed to desegregated schools. Admittedly a compromise, the new plan is far and away better than the old confusion, and it simply does not present any semblance of a return to a dual system.

3. **The Dade County School System, Unitary for Five Years, Demonstrates Improvement Rather Than Regression, and No Basis Exists for Massive Reconstruction Through New Comprehensive Desegregation Plans.**

The whole thrust and purpose of the Petition for Supplemental Relief filed below was to force wide-open new evidentiary hearings, with the object of engaging in full-scale new comprehensive planning to redesign the county school system. As the entire history of this case demonstrates, the School Board accepts and is anxious to carry out its duty to maintain its unitary system. It has acted in the past and will continue to act to correct deficiencies as and when they occur. This is what the standing orders of the Court of Appeals and of the District Court require. The petitioners' objective—comprehensive master planning to fix racial balances in all schools—goes far beyond legal or rational requirements.

Aside from their objections to the Miami Northwestern feeder plan and the School Board's tentative construction plan, the petitioners resorted in their Petition below to a specious percentage game, seeking to show that the court-approved unitary system has "failed." As we explained in our Statement of the Case herein, their list of schools in which black student percentages have increased is incomplete—and even as to these, there is no allegation that the School Board in any way caused the changes. The full picture of grouped and paired schools, including those later added by School Board action, shows a working, if not perfect, desegregation process (See Exhibit III to Response filed below, R. 253). Moreover, the statistical record over the years (Exhibit IV to the Response, R. 257), shows no increase in 90-100% black schools, a large decrease in all-white schools, and a steady increase in schools enrolling 1-30% black students. This is hardly evidence of reversion to a dual system.

Petitioners have attempted to extract language from *Keyes v. School District No. 1, Denver, Colorado*, 413 U.S. 189, 93 S.Ct. 2686 (1973) as the basis for their attempt to throw open the entire system to reorganization. The *Keyes* case comes nowhere near supporting the petitioners' radical interpretation.

In *Keyes*, the Court dealt with a school system never before tested by judicial scrutiny, and with no history of segregation by statutory mandate, but found a "purposeful and systematic program of racial segregation" carried out over a period of years by the local school board, affecting a substantial portion of the students, schools, teachers and facilities within the system. Holding this sufficient to create a presumption that other segregated

schooling in the district was not "adventitious", the Court remanded for further evidence to determine whether the school board's deliberate segregative policies over a decade rendered the entire district a dual system and thus subject to the dismantling process and procedures set forth in *Swann* and earlier decisions.

The Dade County school system has already undergone the dismantling process, and neither the Northwestern feeder plan, nor simple changes in student ratios in some schools, compare in any way with the factual situation which the Court found in *Keyes*. Even the incomplete quotation used by petitioners (Petition p. 18) serves to refute their attempted analogy, for as we have shown earlier, the Miami Northwestern feeder plan does *not* have ". . . the reciprocal effect of keeping other nearby schools predominantly white", since those surrounding schools have long been integrated. In short, no case law and no logic suggests that once a school system has been dismantled and held unitary, the whole system has to be dismantled all over again—even if the courts below had found flaws in the feeder plan, or might later find flaws in the construction projections.

It appears to us that petitioners revealed the weakness of their complaints concerning the feeder plan and the construction plan, by spending almost half of their Petition below trying to find ways to portray the school system as somehow degenerating, or "in jeopardy." Their position and their argument are based upon mistaken preconceptions.

In their preoccupation with racial quotas, petitioners filed a document, the major premise of which seemed to

be that if the student bodies of some schools in the Dade County school system are increasing in black population, the system is becoming segregated.

The School Board does not accept the premise that an increase in black enrollment necessarily creates an undesirable situation, or a situation which in and of itself denies the equal protection of the laws to anyone. It is of note that the District Court in 1970 stated that a predominantly black school is desegregated when less than 85 percent of its enrollment is composed of black students. *See Pate, supra*, 434 F.2d 1151 at 1175. Of all the 36 schools listed in the Petition below as having increased in black membership, only one of these schools has a black enrollment in excess of 85 percent.

The Petition below indicates, and the Board admits, that some Dade County schools are increasing in black student population. It is also true that no Dade County schools are in the process of becoming majority white schools. This is not a situation where the races are segregating. This is a situation where black student population is increasing throughout the schools of the county. The school system makes no apology for this trend.

Part of the reason for the increased black enrollment in many of the previously "white" schools is the school system's majority-to-minority transfer plan. It is working. When students have these choices available to them, and make these choices, it is not reasonable to allege state-imposed segregation. Part also of the record of increased black enrollment is the School Board's demonstrated record of planning school attendance zones to provide integrated schools. As Exhibit III to the Response filed below shows

(R. 253), the Board has not been content to rest with the groupings and pairings set by the court, but has added a number of schools to improve the desegregation process.

While petitioners may feel that a ratio of 25% black and 75% white students in each and every school throughout the system is desirable, there simply is no constitutional requirement that this be done, and the imposition of any particular degree of racial balance is beyond the power of a district court. *Swann, supra*; *Bradley v. School Board of City of Richmond*, 462 F.2d 1058 (4th Cir. 1972), *aff'd. per curiam* 412 U.S. 92, 93 S.Ct. 1952; *Spencer v. Kugler*, 326 F.Supp. 1235 (D.N.J., 1971), *aff'd. mem.* 404 U.S. 1027, 92 S.Ct. 707.

Even in systems never before declared unitary, it is stated that while school systems should make every effort to achieve the greatest possible degree of actual desegregation, the school system must also take into account the practicalities of the situation. *Davis v. Board of School Commissioners of Mobile*, 402 U.S. 33, 37, 91 S.Ct. 1289, 1292 (1971).

Such practical considerations are: the limited usefulness of racial quota ratios; secondly, the necessity of tolerating some one-race schools because minority groups concentrate in urban areas; thirdly, the logistical problems inherent in remedial alteration of attendance zones; and lastly, the limitations on travel that must be considered when transportation remedies are employed. *Northcross v. Board of Education of Memphis City Schools*, 489 F.2d 15 (6th Cir. 1973), *cert. den.* 416 U.S. 962 (1974).

The other premise which seems to underlie the Petition below is that all-black or virtually all-black schools are

bad schools. We reject this notion, and we see it, in fact, as approaching a racist preconception. Obviously, it is desirable to have mixed student bodies wherever possible, but where it is not feasible there is no warrant for any *a priori* labeling of black schools as inferior.

It is true that the Dade County school system has a number of one-race or almost-one-race schools. It is also true that despite these one-race or almost-one-race schools, the school system has now three times been held unitary by the Court of Appeals. The important fact is that the existence of some small number of one-race schools or virtually-one-race schools within a school system is not in and of itself a sign of a system which practices segregation by law. *Swann, supra,* 91 S.Ct. at page 1281.

This school system, the last time it was challenged, through the lower courts and to this Court, carried the *Swann* burden of showing that these schools were not discriminatory. The number of one-race or virtually-one-race schools has not been increased, nor is there any allegation by petitioners that this is so. Accordingly, the Board need not once again prove that the existence of these schools is not discriminatory.

If anything is now clear in the law of desegregation, it is that the elimination of all schools having single or identifiably one-race student bodies is *not* required by the Constitution. *Swann* said so, and in at least three later cases this Court has refused to entertain challenges based upon black student-counting. This very case was the first. The second was *Goss v. Board of Education of Knoxville,* 482 F.2d 1044 (6th Cir. 1973), *cert. den.* 414 U.S. 1171 (1974). The last was *Northcross v. Board of Education of Memphis, supra.*

Furthermore, petitioners overlook the fact that the racial composition of the student body is not the sole criterion for determining whether a constitutional problem exists. It is true that, where it is possible to identify a school as a "white school" or a "Negro School" on the basis of existing policy and practice with regard to faculty, staff, transportation, extracurricular activities and facilities, there is a *prima facie* case of violation of constitutional rights. *Swann, supra*, 91 S.Ct. at 1277.

The Petition filed below, however, mentions none of the above criteria, but devotes itself almost solely to the student head-counting.

Petitioners also make the rather curious argument that because the District Judge has decided to inquire into the School Board's tentative Five-Year Construction Plan, this somehow justifies the assumption that constitutional defects *will* be found, and they then proceed to leap to the conclusion that the only possible remedy could be the new "total desegregation plan" which they are anxious to submit. The School Board is perfectly willing to review its construction planning in detail before the District Court, but it rejects petitioners' *idee fixe* that specific adjustments would not be acceptable, and that only total new planning could be the solution to any problem. The remedy, if any is needed, should fit the problem, if any exists.

Rhetoric aside, the statistics show that the Dade County school system is not becoming more segregated. On the contrary, the system has made substantial steps, above and beyond those ordered by the courts below, to become a more integrated system. The system as a whole is well and going about the business of educating children, while

mindful of its obligation to maintain its unitary status. Its remaining schools with unmixed student bodies are well within tolerable limits, and no School Board segregative action has been shown, much less any reversion to anything resembling a "dual school system". With due respect to the eminent Dr. Finger's ability and reputation, there is simply no legal basis here for his comprehensive planning talents.

CONCLUSION

The courts below properly saw the Northwestern feeder plan as it is—a modest effort, neutral in purpose and effect so far as desegregation is concerned, to correct a bizarre and fractured student assignment situation. The District Judge will examine the School Board's construction plan, and it remains to be seen whether it is open to valid criticism.

In any event, flaws in either of these School Board actions cannot by any stretch amount to a legal predicate for an entire new dismantling of the whole school system.

The case before the Court is but one more recurrent reflection of petitioners' perennial fixation that only rigid racial balances in all schools can achieve "true" desegregation. This clearly is not the law, and there is no justification for the demand for new hearings, new beginnings, a Finger plan, and a top-to-bottom redesign of the Dade County schools to suit petitioners' theories. The petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the above and foregoing Brief in Opposition to Petition for Writ of Certiorari have been served upon all parties required to be served, service having been effected by mail, in accordance with paragraph 1 of Rule 33 of the Rules of the Supreme Court of the United States, to the following named attorneys of record, on the ____ day of June, 1975.

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